Supreme Court, U.S.
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No. 93-1777

In the Supreme Court of the United States

OCTOBER TERM, 1993

DOUGLAS LACHANCE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Parole Commission correctly interpreted 18 U.S.C. 4210 when it provided by regulation, 28 C.F.R. 2.52(c)(2), that a parolee forfeits credit for time spent on parole if his parole is revoked because he was convicted of an offense punishable by imprisonment, even though no imprisonment was imposed for that conviction.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 13 F.3d 586. The opinion of the district court (Pet. App. 1c-19c) is reported at 812 F. Supp. 436.

JURISDICTION

The judgment of the court of appeals was entered on January 7, 1994. A petition for rehearing was denied on February 4, 1994. Pet. App. 1b. The petition for a writ of certiorari was filed on May 4, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Parole Commission extended petitioner's term of confinement by ordering forfeiture of his time served on parole because he was convicted of an offense punishable by imprisonment committed while he was on parole. The United States District Court for the Southern District of New York denied petitioner's petition for a writ of habeas corpus. The court of appeals affirmed.

1. In May 1980, petitioner was convicted of extortion, federal income tax evasion, and racketeering. He was sentenced to 12 years' imprisonment, which he began serving in 1981. He was released on parole on December 20, 1985. Pet. App. 2a-3a.

In 1988, petitioner was convicted on state charges of careless driving and refusing to submit to a breathalyzer test. The careless driving offense was punishable by a maximum term of 15 days' incarceration, but petitioner did not receive a custodial sentence. He was fined $250 for careless driving and $50 for refusing to take the breathalyzer test. That criminal conduct violated the terms of his parole, but the Parole Commission did not revoke petitioner's parole at the time. It instead gave him a "Letter of Reprimand," which warned him that "continued disrespect and noncompliance with your conditions of release will result in your arrest and your return to custody." Pet. App. 3a.

2. Parole officers became aware that petitioner had been deceiving them for years about his continued substance abuse, in violation of the terms of his parole. As late as February 1992, petitioner denied any personal use of cocaine, but in fact he had a long-

standing cocaine-abuse problem. See Gov't C.A. Br. 4-6. In late 1992, when petitioner had three months of parole left to serve on his original 12-year sentence, the Parole Commission held a parole revocation hearing and found that petitioner had used cocaine and committed other parole violations. The Commission revoked his parole, ordered his "street time" of seven years on parole forfeited, and ordered him to prison with anticipated reparole after eight months, to be followed by parole supervision with a special drug aftercare condition.

The forfeiture of petitioner's street time upon revocation of parole was based on his 1988 state conviction and application of the Parole Commission's regulation, 28 C.F.R. 2.52(c)(2), which provides in pertinent part:

> It is the Commission's interpretation of 18 U.S.C. 4210(b)(2) that, if a parolee has been convicted of a new offense committed subsequent to his release on parole, which is punishable by any term of imprisonment, detention, or incarceration in any penal facility, forfeiture of time from the date of such release to the date of execution of the warrant is an automatic statutory penalty, and such time shall not be credited to the service of the sentence. An actual term of confinement or imprisonment need not have been imposed for such conviction; it suffices that the statute under which the parolee was convicted permits the trial court to impose any term of confinement or imprisonment in any penal facility.

3. Petitioner filed a petition for a writ of habeas corpus seeking to have his forfeited street time

restored. The district court denied the petition. Pet. App. 2a.

The court of appeals affirmed. Petitioner conceded that the Commission could, under 18 U.S.C. 4210 (b)(2), forfeit his street time because of his state conviction if he had been incarcerated for that offense, but petitioner claimed that the Commission could not take that action when he had not received a sentence of imprisonment. The court of appeals rejected that claim.

The court first stated that the statute was ambiguous, because it authorizes the Commission to provide that the unexpired parole term "shall run concurrently or consecutively with the sentence imposed for the new offense," 18 U.S.C. 4210(b)(2), but also states that the Commission "may impose forfeiture of street time upon 'a parolee who has been convicted of any criminal offense . . . *punishable* by a term of imprisonment.' " Pet. App. 5a, quoting 18 U.S.C. 4210(b)(2) (emphasis added by court). The court concluded, however, that the Parole Commission's interpretation—that incarceration on the new offense is not required to justify forfeiture of street time—is reasonable and entitled to deference. Pet. App. 7a. The court noted that the conference committee report on the provision stated that "[t]he phrase 'punishable by a term of imprisonment' " includes offenses where "any term of confinement * * * may be levied upon adjudication of guilt * * * *even if no sentence of imprisonment was imposed.*" Pet. App. 6a (quoting H.R. Rep. No. 838, 94th Cong., 2d Sess. 32 (1976); emphasis added by the court). The court concluded that the Commission regulation was a lawful interpretation of 18 U.S.C. 4210, thus concurring

with the Seventh Circuit, the only other court of appeals to address that question. See Pet. App. 5a (citing *United States ex rel. Del Genio* v. *United States Bureau of Prisons*, 644 F.2d 585, 588 (7th Cir. 1980), cert. denied, 449 U.S. 1084 (1981)).

ARGUMENT

Petitioner asserts (Pet. 7-18) that the forfeiture of his street time upon revocation of his parole is invalid because he was not incarcerated for the state offense that triggered the revocation. Although the forfeiture was required by a Commission regulation, petitioner argues that the regulation is inconsistent with 18 U.S.C. 4210(b)(2). That claim has no merit.

Petitioner argues that his state offense cannot serve as a basis for forfeiting his street time unless he actually was sentenced to a term of imprisonment for that offense. He relies on the phrase in Section 4210(b)(2) directing the Commission to determine "whether all or any part of the unexpired term being served at the time of parole shall run concurrently or consecutively with the sentence imposed for the new offense." Pet. 8-9. In petitioner's view, there was no "sentence imposed" for his state conviction because he did not receive a sentence of incarceration. Pet. 9-13. In the alternative, petitioner invokes the rule of lenity to urge a construction of Section 4210 that would limit that provision to cases in which a term of imprisonment actually was imposed for the offense committed while on parole. Pet. 15-18.

The statute does not support petitioner's contention. The introductory language of 18 U.S.C. 4210(b)(2) gives the Commission authority to act "in the case of a parolee who has been convicted of any

criminal offense committed subsequent to his release on parole, and such offense is punishable by a term of imprisonment." The reference to an offense "punishable" by imprisonment indicates that no term of imprisonment need be imposed to justify the Commission's action. As the court of appeals noted, the legislative history confirms that Congress intended the provision to reach all offenses that carry the potential for imprisonment; the provision applies "*even if no sentence of imprisonment was imposed.*" Pet. App. 6a (quoting H.R. Rep. No. 838, 94th Cong., 2d Sess. 32 (1976); emphasis added by the court). Thus, it is immaterial that the sentence actually imposed on petitioner for his state offense did not include a term of imprisonment. While the statute requires the Commission to determine whether to make the unexpired sentence run concurrently or consecutively with the new sentence when imprisonment is imposed for the new offense, the statute does not suggest that imprisonment *must* be imposed to warrant Commission action.

Because there is no ambiguity in the statute itself, petitioner's reliance on the rule of lenity is misplaced. As this Court stated in *Chapman* v. *United States*, 500 U.S. 453, 463 (1991): "The rule of lenity * * * is not applicable unless there is a 'grievous ambiguity or uncertainty in the language and structure of the Act,' *Huddleston* v. *United States*, 415 U.S. 814, 831 (1974), such that even after a court has ' "seize[d] every thing from which aid can be derived," ' it is still 'left with an ambiguous statute.' *United States* v. *Bass*, 404 U.S. 336, 347 (1971) (quoting *United States* v. *Fisher*, 2 Cranch 358, 386 (1805))." In this case, the language of the statute does not contain any "grievous ambig-

uity or uncertainty," and what imprecision may be found is resolved with the aid of the conference committee report, which speaks directly to the question at issue.

Petitioner cites no authorities conflicting with the result in this case. Moreover, Section 4210, along with other parole provisions, was repealed by the Sentencing Reform Act, Pub. L. 98-473, Tit. II, § 218(a)(5), 98 Stat. 2027 (1984), although the provision continues to apply to individuals who committed offenses prior to November 1, 1987. See Pub. L. No. 101-650, Tit. III, § 316, 104 Stat. 5115 (1990). Because of the declining number of individuals subject to the provision, the issue raised by petitioner is not likely to recur with any frequency.* Accordingly, the issue does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1994

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* Since 1981, when this Court denied the petition for a writ of certiorari in *United States ex rel. Del Genio, supra*, this issue does not appear to have resurfaced.